

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEITH B. TALBERT)	
Claimant)	
VS.)	
)	Docket Nos. 177,993
CITY OF WICHITA)	177,994
Respondent)	180,908
Self-Insured)	189,621
AND)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appealed the Award entered by Administrative Law Judge Shannon S. Krysl dated October 17, 1994.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, David J. Morgan of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Kurt W. Ratzlaff of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The following issues were raised by the respondent for Appeals Board review:

- (1) Whether the Administrative Law Judge erred when she considered Dr. Blaty's opinion regarding permanent functional impairment of claimant's right shoulder injury.

- (2) The nature and extent of claimant's disability.
- (3) Liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, hearing the arguments and considering the briefs of the parties, the Appeals Board finds as follows:

(1) The Award of the Administrative Law Judge consolidated four separate docketed cases that alleged four different accidents that caused injury to the claimant while working for the respondent. However, the respondent, both during oral argument before the Appeals Board and as clarified in its brief filed with the Appeals Board, has only requested review of Docket No. 189,621 with the alleged date of accident of February and March of 1994 which resulted in an injury to both of claimant's shoulders. The Administrative Law Judge found claimant was entitled to a 7 percent permanent partial general whole body disability as the result of work-related injuries to both of claimant's shoulders. The Administrative Law Judge based the 7 percent disability finding on Dr. Lawrence R. Blaty's 7 percent permanent functional impairment opinion. Claimant had returned to work for the respondent after all of his alleged work-related injuries at a comparable wage. Therefore, he was not eligible for work disability and did not request it. See K.S.A. 44-510e(a).

Respondent first asserted that Dr. Blaty's functional impairment opinion, in regard to claimant's right shoulder, was inadmissible evidence because K.S.A. 44-510(c)(2) was amended on July 1, 1993, to provide that a physician's opinion was inadmissible if the unauthorized medical allowance was used to obtain a functional impairment rating opinion. Claimant pointed out in his brief that the Administrative Law Judge did not make an award of unauthorized medical expenses. Accordingly, the claimant argued he did not use the unauthorized medical expense to obtain the permanent functional impairment rating from Dr. Blaty. The Appeals Board agrees with the claimant and finds that Dr. Blaty's permanent functional impairment rating opinion is admissible evidence to be considered by the fact finder.

(2) In regard to the nature and extent of claimant's disability, respondent argued that the Administrative Law Judge should have considered the opinion of Dr. Robert Eyster equally with the opinion of Dr. Blaty in assessing a permanent functional impairment award for claimant's bilateral shoulder injuries. Dr. Eyster treated claimant from July 12, 1993 through July 28, 1994. Dr. Eyster provided conservative treatment and saw the claimant approximately ten times within that period. Dr. Eyster also referred claimant for an MRI in May of 1994 which had negative results. During claimant's first visit on July 12, 1993, Dr. Eyster's medical notes indicate that claimant did complain of numbness in his left arm and thoracic region. However, Dr. Eyster did not provide any treatment for either claimant's upper extremities or shoulders. Dr. Eyster's medical records also do not reflect the claimant had any further complaints in regard to those areas. Dr. Eyster's treatment concentrated on claimant's low back strain with radiculopathy down the left leg. Dr. Eyster testified that claimant's shoulder complaints subsided. Dr. Eyster opined that claimant had no functional impairment in his shoulders. Therefore, respondent argued that Dr. Eyster's impairment opinion should be given equal weight with Dr. Blaty's 7 percent functional impairment opinion. Accordingly, respondent concluded that the appropriate award for claimant's work-related bilateral shoulder injuries would be 3.5 percent permanent partial general body disability.

After reviewing Dr. Eyster's medical records and testimony, the Appeals Board agrees with the respondent and finds there is no good reason in the evidentiary record to ignore or not equally weigh Dr. Eyster's opinion with the opinion of Dr. Blaty. The Appeals Board, therefore, finds that the appropriate permanent partial general body disability award for claimant's work-related bilateral shoulder injuries should be modified from 7 percent to 3.5 percent.

(3) The Administrative Law Judge found that the Fund had no liability in this case. The Administrative Law Judge found the respondent had failed to present evidence in the record to meet its burden of proving it had knowledge that claimant had a preexisting impairment to his shoulders which would constitute a handicap in obtaining or retaining employment. See K.S.A. 44-567.

Respondent argued that claimant was a handicapped employee after his left shoulder was injured on January 11, 1993. Respondent contended claimant's testimony established his right shoulder became symptomatic because claimant overcompensated for his injured left shoulder while performing his work activities. Claimant testified that he originally injured his left upper extremity and shoulder along with his low back on January 11, 1993 while carrying a 385-pound insulation machine with a co-worker. Claimant testified that he continued to perform his regular work activities after that accident as a working-labor supervisor. Claimant testified that in February and March of 1994, because of overcompensating for his injured left shoulder, he developed symptoms in his right upper extremity and shoulder. Claimant also established that his left upper extremity worsened during that period of time.

As previously noted, Dr. Blaty was the only physician to find claimant had sustained permanent functional impairment as a result of his bilateral shoulder injuries. Dr. Blaty also was the only physician to give an opinion on whether claimant's right shoulder disability was either caused or contributed to by his left shoulder impairment. See K.S.A. 44-567. Dr. Blaty opined that 60 percent of claimant's right shoulder problems were a result of overcompensating because of his preexisting left shoulder problems. The remaining 40 percent of his resulting disability in his right shoulder was from his regular work activities.

The Appeals Board finds that when claimant's testimony and Dr. Blaty's testimony are examined together, the respondent has met its burden that it retained claimant as a handicapped employee after his left shoulder injury and claimant continued to perform his work activities using his right shoulder to compensate for his left shoulder injury. This overuse then contributed to 60 percent of claimant's resulting permanent functional impairment to his right shoulder of 2 percent. Accordingly, the Appeals Board finds that claimant's preexisting left shoulder injury contributed 60 percent to claimant's 2 percent right shoulder disability or 1.2 percent. Therefore, the Appeals Board finds the Fund is responsible for 34 percent of the total 3.5 percent permanent partial general body disability award.

AWARD

Docket Nos. 177,993; 177,994 & 180,908

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Appeals Board adopts the Award and all orders of the Administrative Law Judge in reference to the above docket numbers as if specifically set forth in this Order.

AWARD**Docket No. 189,621**

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated October 17, 1994, in reference to Docket No. 189,621 is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Keith B. Talbert, and against the respondent, City of Wichita, a qualified self-insured, and the Kansas Workers Compensation Fund for an accidental injury which occurred, for computational purposes, on March 17, 1994, and based upon an average weekly wage of \$535.40.

Claimant is entitled to 14.53 weeks at \$313 per week for a total of \$4,547.89 for a 3.5% permanent partial general body disability, making a total award of \$4,547.89 which is due and owing and ordered to be paid in one lump sum less any amounts previously paid.

The Kansas Workers Compensation Fund is hereby ordered to pay 34% of the award entered in this matter.

All other orders of the Administrative Law Judge contained in her Award that are not inconsistent with this Order are incorporated herein and made a part of the Appeals Board Order.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
David J. Morgan, Wichita, KS
Kurt W. Ratzlaff, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director